Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

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No. 76-1079

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JOSEFA LEVC (nee O'BLAK) and
IVANA OGRIN (nee O'BLAK),

Petitioners,

v.

HONORABLE HOLLIS G. CONNORS,
Treasurer of the State of
Montana, and KEITH COLBO,
Director, Department of Revenue
of the State of Montana,

Respondents.

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# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## OPINION BELOW

Levc, et al, vs. Connors, et al, 33
St. Reporter 989 (Mont.), 555 P. 2d 750.

## JURISDICTION

Petitioners invoke jurisdiction if this Court under 28 U.S.C. 1257(3), which Respondents dispute.

## QUESTION PRESENTED

Respondents disagree with the question presented as set forth by Petitioner. The State of Montana Supreme Court has not denied Yugoslav citizens the same exemption from a two-year time limitation granted by statute to United States citizens to bring an action for recovery in an escheated estate, nor has it by its decision deprived Yugoslavian heirs of a right of inheritance provided for them by treaty and prior decisions of this Court. The question presented is whether or not Section 91-509 of the Revised Codes of Montana, 1947, a statute



of limitations, starts to run "within two (2) years from the date on which money or property is recovered by the State Treasurer", or whether it starts to run when heirs receive notice of death of a decedent.

Respondents position is that it is the former and that this is solely a question of Montana law, is not a federal question, and that this Court under 28 U.S.C. 1257(3) as well as Supreme Court Rule 19(a) lacks jurisdiction or at least should deny the Petition for lack of a substantive federal question, and that even if this Court has jurisdiction, the question of law at issue was rightly decided by the Montana Supreme Court.

## STATEMENT OF CASE

Petitioner's statement of the facts of this case is inaccurate and argumen-

tative. The following is a correct statement of facts:

One Frank O'Blak, as a resident of Montana, died intestate at Billings, Montana, on June 25, 1970. His estate was administered before the District Court for Yellowstone County. No heirs having claimed the estate, a net cash sum of $8,693.91, it was escheated under Montana law, to the State of Montana. Pursuant thereto, the Treasurer of the State of Montana received the escheated sum and issued her receipt therefor on January 22, 1971.

Some two years and seven months later, on August 14, 1973, Josefa Levc and Ivana Ogrin, Petitioners herein, filed their Complaint in Lewis and Clark County District Court of Montana, alleging themselves to be nieces and heirs-at-law of



said Frank O'Blak and praying that the escheated money be paid over to them and representing to the District Court that they had only received notice of his death on May 24, 1972.

On October 7, 1973, the then Attorney General of the State of Montana answered the Complaint and plead as a defense the two-year statute of limitations on such claim, Section 91-509, R.C.M., 1947. The District Court requested briefs which were submitted on the question of when the statute of limitations started to run: (a) When the monies were first deposited with the State Treasurer, January 22, 1971, as the statute provides; or (b) When the Yugoslavian heirs first received notice of the death of the decedent uncle, May 24, 1972? The State District Court found that the statute of

limitations, Section 91-509, R.C.M., 1947, did not begin to run until the heirs received notice, that the complaint was timely filed, and that the Petitioners should have appropriate judgment. The District Court based its decision on the fact that Section 91-509, R.C.M., 1947, provides that it will not run against United States citizens while they are out of the country and that, therefore, it would not run against Yugoslavian heirs until they had notice of the death of the decedent.

The Respondents, believing this decision of the District Court to be in error, appealed the decision to the Montana Supreme Court. It reversed the District Court ruling on the basis that the statute of limitations was specific and being specific the District Court



errored in reading into it this additional bar to the running of the statute, i.e., notice of death of decedent.

ARGUMENT

The State of Montana has no argument with the United States Supreme Court cases Kolovrat vs. Oregon, 366 U.S. 187 (1961) and Consul General of Yugoslavia vs. Pennsylvania, 375 U.S. 395 (1964), or Zschervig vs. Miller, 389 U.S. 429 (1968). The decision of the Montana Supreme Court is not in conflict with any of these prior decisions of this Court. Rather, it is in complete harmony with them. As the Montana Supreme Court says in its decision:

> "It is settled by Kolovrat vs. Oregon, 366 U.S. 187, 6 L. Ed 2d 218, 81 Sct. 922, and Estate of Spehar, 140 Mont. 76, 367 P. 2d 563, that under the reciprocity provisions of an 1881 treaty and its 'most favored nation'

> law, Yugoslavian claimants have the same right to inherit their relatives' personal property as they would if they were American citizens living in Montana". (See page 4(a) and 5(a) of Petitioners' Petition.)

However, the Montana Court did decide that in this case the Yugoslavian claimants were governed by the same law as United States citizens and could not inherit, their claim being barred by the statute of limitations, 91-509, R.C.M., 1947. The basis for this decision is supplemented by the facts and the law.

At the outset, the Respondents pleaded by way of affirmative defense that this action was barred by Section 91-509, R.C.M., 1947, as amended, because the State Treasurer receipted for the money on January 22, 1971, and a complaint was filed more than two years later, namely, on August 14, 1973.



Section 91-509, R.C.M., 1947, as amended, states as follows:

> "Any persons claiming property in the hands of the state treasurer must bring an action in the district court of Lewis and Clark County, Montana, against the state treasurer. In such action, one copy of the complaint and summons must be served upon the state treasurer, one must be served upon the attorney general and one must be served upon the director of revenue.
>
> Such action shall be prosecuted subject to all of the provisions of the statutes of this state in relation to civil actions generally, including the right of either party to appeal to the supreme court of the State of Montana. Such action must be brought within two (2) years from the date on which money or property is received by the state treasurer, saving, however, to infants and persons of unsound mind, or citizens of the United States beyond the limits of the United States, the right to commence their action at any time within the time limited or two (2) years after their respective disabilities cease. Underlining ours.

> The judgment of the court in such action shall determine and fix the amount of inheritance tax, if any, which is due from said claimant to the State of Montana upon the money or property claimed and none of said money or property shall be turned over to said claimant until said inheritance tax is paid. The state department of revenue shall issue its interlocutory certificate showing the amount of said inheritance tax due, if any, and shall have the right to file objections and be heard upon the final determination of said tax."

Said statute provides clearly for three disabilities which would prevent the statute from running, namely: (1) infants, (2) persons of unsound mind, and (3) citizens of the United States beyond the limits of the United States.

The Petitioners suggested to the trial court that the Petitioners, residents of Yugoslavia, had to have actual knowledge of the death of the decedent even though they were not infants nor persons of unsound mind nor citizens of Yugoslavia



who resided out of or whoever were beyond the limits of Yugoslavia.

The effect of such a contention is to read into the statute by judicial interpretation two distinct disabilities obviously not written into the statute by the legislature, namely, (a) notice, (b) residents outside of the United States.

The Respondents contended that any conclusion based upon an increase of the number of disabilities contained in Section 91-509 R.C.M., 1947, as amended, was erroneous. Notice of the death of a deceased is not a disability or exception to the statute. If such were the case, there would be no reason for a statute. If the legislature had desired to add the two disabilities urged by the Petitioners, they could have done so.

As a general rule, courts will not read into statutes of limitation an exemption or disability which has not been embodied therein, however reasonable such exception or disability may seem, and even though the exception or disability would be an equitable one. The modern rule of construction in this respect is that unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, it must receive a general construction, and the courts cannot arbitrarily subtract therefrom or add thereto. Undoubtedly a hardship will result in many cases under this rule, but the court may construe only the clear words of the statute, and if its scope is to be enlarged, the remedy should be legislative rather than judicial. In addition, as a general rule, where an



exception to the operation of the statute of limitations is not expressly mentioned in the statute, no such exception will be made on the ground of inability to bring suit, absence or non-residence of a party or revision of process. 51 Am Jur 2d, Limitation of Actions, Section 138, pages 708 and 709. The enumeration of specific exceptions by the legislature ordinarily excludes all others by implication, and usually precludes the court from creating additional exceptions by judicial construction.* 51 Am Jur 2d, Limitation of Actions, Sec. 142, page 713.

Limitation statutes making exceptions in favor of persons under disability must be strictly construed. Anderson v. Mace, 45 P 2d 771, 99 Mont. 421.

*"Expressio unius est exclusioal terius" (The expression of one thing implies the exclusion of another.)

Absent fraud, and fraud is not an element of this case, the mere fact that a person entitled to an action has no knowledge of his right to sue or of the facts out of which his right arises, does not prevent the running of the statute or postpone the commencement of the period of limitation until he discovers the facts or learns of his rights thereunder. There are exceptions to this rule, however, but these exceptions relate to warranty, malpractice and workmen's compensation cases. 51 Am Jur 2d, Limitation of Actions, Sec. 146, pgs. 715 and 716. Ignorance of the facts necessary to give Plaintiff a right of action cannot be implied by law unless it is occasioned by improper conduct of Defendant. Bennett v. Meeker, 202 P 203, 61 Mont. 307.



In absence of fraudulent concealment, the running of the statute of limitations is not prevented, although the party having a right of action was ignorant of its existence. Kerrigan v. O'Meara, 227 P 819, 71 Mont. 1.

The fact that a person entitled to action has no knowledge of his right to sue will not prevent running of the statute. Fall Sand & Gravel Co. v. Western Concrete, Inc., 270 F. Supp. 495; Carlson v. Ray Geophysical Division, 481 P 2d 327, 156 Mont. 450.

The validity of the statute of limitations as it relates to the right of an alien to inherit was upheld In Re Colbert's Estate, 44 Mont. 259, 119 Pac. 791. 51 Am Jur 2d, Limitation of Actions, Sec. 408, page 881. The United States Supreme Court has also spoken to the

purpose and validity of statutes of limitation. Burnett v. New York Central Railway Company, 380 U.S. 424, 13 L. Ed. 2d 941, 85 S. Ct. 1050.

As a consequence, Respondents submit that the Montana Supreme Court decision is correct, under the law, that the interpretation of the statute that Petitioners are trying to place on it is in error, and that under the particular statute the Petitioners are not entitled to inherit.

Respondents further submit, as aforesaid, that this Court is without jurisdiction to hear this matter under Section 28 U.S.C. 1257(3) and Rule 19 of the United States Supreme Court Rules. The interpretation of Section 91-509 R.C.M., 1947, as to its meaning under Montana law is a question of State law for the



State of Montana courts. The Supreme Court of Montana decision from which Petitioners certiorari to this Court does not decide any federal question. It does not decide any Federal Statute, Constitutional question or Treaty. It merely decides a Montana law question as to a State statute of limitations.

> "to give the Supreme Court jurisdiction it must in some way appear from the return which is made to the writ of error that the validity of a treaty or statute of the United States or an authority exercised under it has been drawn in question and the decision is against their validity". Brown vs. Colorado, 106 U.S. 95, 27 L ed 132, 1 SCR 175.

The Supreme Court has no jurisdiction to review State court decisions based on non-federal grounds. (1872) Kennebec & Portland Railroad Co. v. Portland & Kennebec Railroad Co., 81 US (14 Wall) 23, 20 LEd 850; (1888) Phillips v. Mound

City Land & Water Assn., 124 US 605, 31 LEd 588, 8 SCR 657; (1889) McKenna v. Simpson, 129 US 506, 32 LEd 771, 9 SCR 365; (1890) Cornell University v. Fiske, 136 US 152, 34 LEd 427, 10 SCR 775, aff'g 111 NY 66, 19 NE 233; (1892) O'Neil v. Vermont, 144 US 323, 36 LEd 450, 12 SCR 693; (1898) Conde v. York, 168 US 642, 42 LEd 611, 18 SCR 234; (1905) Allen v. Arguimbau, 198 US 149, 49 LEd 990, 25 SCR 622; (1909) Waters-Pierce Oil Co. v. Texas, 212 US 86, 53 LEd 417, 29 SCR 220, aff'g 48 TexCivApp 162, 106 SW 918; (1909) Kenney v. Craven, 215 US 125, 54 LEd 122, 30 SCR 64; (1912) Creswill v. Grand Lodge, 225 US 246, 56 LEd 1074, 32 SCR 822, rev'g 133 Ga 837, 67 SE 188, 134 AmStRep 231, 18 AnnCas 453; (1913) Adams v. Russell, 229 US 353, 57 LEd 1224, 33 SCR 846.



Where no federal question was presented, the judgment of the state court was affirmed. (1887) Chapman v. Crane, 123 US 540, 31 LEd 235, 8 SCR 211, aff'g 61 Iowa 261, 16 NW 486, and 64 Iowa 602, 21 NW 103.

Where the disposition of a federal question was not necessary to the determination of the cause and the judgment is based on a distinct ground or grounds broad enough to sustain it, over which Supreme Court had no jurisdiction, the writ of error cannot be maintained. (1909) Rogers v. Jones, 214 US 196, 53 LEd 965, 29 SCR 635.

Writ of error was dismissed where state court judgment rested on sufficient grounds independent of federal question. (1920) Minneapolis, St. Paul, & Sault Ste. Marie Railway Co. v. Washburn Lignite

Coal Co., 254 US 370, 65 LEd 310, 41 SCR 140.

Judgment of state court supportable on non-federal grounds would be affirmed. (1925) Browne v. Union Pacific Railroad Co., 267 US 255, 69 LEd 601, 45 SCR 315, aff'g 113 Kan 726, 216 Pac 299.

Where the decision was supported by a non-federal ground, the unnecessary discussion of a federal question by the state court was not ground for issuance of certiorari. (1927) George O. Richardson Machinery Co. v. Scott, 274 US 749, 71 LEd 1319, 48 SCR 264.

Where decision of a state court was supportable on a non-federal ground, a review of the cases was denied by the United States Supreme Court. (1934) Utley v. St. Petersburg, 292 US 196, 78 LEd 1155, 54 SCR 593; (1934) Bass v.



Milledgeville, 295 US 721, 79 LEd 1675, 55 SCR 926; (1935) U.S. v. Hastings, 296 US 188, 80 LEd 148, 56 SCR 218.

Defenses on the state grounds against tax overruled by state supreme court could not be reviewed on appeal by United States Supreme Court. (1934) Nickey v. Mississippi, 292 US 393, 78 LEd 1323, 54 SCR 743, aff'g 167 Miss 650, 145 So 630.

Where state court's decision was based on adequate non-federal grounds, and state court had merely formally determined federal question which did not appear to be a substantial one, Supreme Court was without jurisdiction. (1937) Honeyman v. Hanan, 300 US 14, 81 LEd 476, 57 SCR 350, vac'g 246 App Div 718, 285 NYS 527.

Where highest state court would not entertain original application for writs of habeas corpus save on a record which excluded on its face the possibility of any trial in that court of an issue of fact, the United States Supreme Court could not say that state court's refusal to entertain petition for habeas corpus did not rest on an adequate non-federal ground. (1945) White v. Ragen, 324 US 760, 89 LEd 1348, 65 SCR 978.

## CONCLUSION

The decision of the Montana Supreme Court over which the Petitioners seek a Writ of Certiorari is not in error. Further, that decision consists of what is solely a question of state law and not a federal question. As a



consequence, this Court lacks jurisdiction and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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